

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

: PHYLIS ANNE BROWNE, BEVERLY ENGELLAND, ELEANORE
: PELISKA, BETTY C. BASSETT, YETTA DEITCH, VIRGINIA
: LEMBERGER, DONNA SCHLAEFER, KATHERINE L. HANNA,
: LORRAINE TESKE, JUDITH D. BERNS, NINETTE SUNN,
: MARY MARTINETTO, CHARLOTTE M. SCHMIDT and ESTHER
: PALS GROVE, et al,
:

Complainants,

vs.

THE MILWAUKEE BOARD OF SCHOOL DIRECTORS; THE
AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, AFL-CIO; DISTRICT COUNCIL 48,
AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, AFL-CIO; JOSEPH ROBISON,
DIRECTOR OF DISTRICT COUNCIL #48; LOCAL 1053,
AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, AFL-CIO; MARGARET SILKEY,
as President of Local 1053; and FLORENCE
TEFELSKE, as Treasurer of Local 1053,

Respondents.

Case 99
No. 23535
MP-892
Dec. No. 18408-L

: WALTER J. JOHNSON, MARSHALL M. SCOTT, GERALD
: LERANTH, OLIVER J. WALDSCHMIDT, ERNA BYRNE,
: CHRISTINA PITTS, MILDRED PIZZINO, JOHN P.
: SKOCIR, HELEN RYZNAR, ANNABELLE WOLTER,
: CHERRY ANN LE NOIR, DORIS M. PIPER,
: LYNN M. KOZLOWSKI, EDWARD L. BARLOW,
: IRVING NICOLAI, and ANNE C. TEBO, et al,
:

Complainants,

vs.

COUNTY OF MILWAUKEE, a body Corporate;
AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, AFL-CIO; DISTRICT
COUNCIL 48, AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, and
JOSEPH ROBISON, its Director; LOCAL 594,
AFSCME, affiliated with District Council 48;
LOCAL 645, AFSCME, affiliated with District
Council 48; LOCAL 882, AFSCME, affiliated with
District Council 48; LOCAL 1055, AFSCME,
affiliated with District Council 48; LOCAL 1654,
AFSCME, affiliated with District Council 48;
and LOCAL 1656, AFSCME, affiliated with
District Council 48,

Respondents.

Case 161
No. 29581
MP-1322
Dec. No. 19545-L

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. John H. Bowers, 214 West Mifflin
Street, Madison, Wisconsin, 53703, on behalf of the Respondent Unions.
Mr. Raymond J. LaJeunesse, Jr., National Right to Work Legal Defense
Foundation, Inc., 8001 Braddock Road, Suite 600, Springfield, Virginia,
22160, on behalf of the Complainants.

No. 18408-L
No. 19545-L

ORDER DENYING MOTION FOR RECONSIDERATION

The Respondent Unions having, on May 2, 1988, filed a Motion For Reconsideration with the Commission wherein they requested that the Commission reconsider its Order of April 20, 1988 1/ denying the Respondent Unions' request for approval of their Hudson Notice to Nonmember Fair Share Payors; and the Complainants having, on May 17, 1988, filed their Opposition To Motion For Reconsideration; and the Commission having considered the Respondent Unions' Motion and the positions of the parties with respect to said Motion, and being satisfied that the Respondent Unions' Motion should be denied;

NOW, THEREFORE, it is

ORDERED

That the Respondent Unions' Motion For Reconsideration be, and same hereby, is denied.

Given under our hands and seal at the City of
Madison, Wisconsin this 12th day of July, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman
Herman Torosian
Herman Torosian, Commissioner
A. Henry Henpe
A. Henry Henpe, Commissioner

1/ Dec. Nos. 18408-K, 19545-K (WERC, 4/88).

MILWAUKEE PUBLIC SCHOOLS
MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING ORDER
DENYING MOTION FOR RECONSIDERATION

On April 20, 1988, the Commission issued its Order denying the Respondent Unions' request for approval of its Hudson 2/ notice. The Commission's denial was based on:

- (1) The failure to change the dates in the notice regarding when objections or challenges must be filed (November 30, 1987 is stated in the notice);
- (2) The failure to include the paragraph contained in paragraph 5 of the Unions' first motion for approval of their notice filed October 27, 1987, regarding the right of challengers to an advance rebate; and
- (3) The untimely nature of the financial information provided in the notice as the basis for the fee to be collected for the period from June 30, 1987 to June 30, 1988.

On May 2, 1988, the Respondent Unions filed their Motion For Reconsideration requesting that the Commission reconsider its April 20, 1988 Order and approve the Respondent Unions' Notice.

RESPONDENT UNIONS

In their "Motion For Reconsideration" the Respondent Unions ask that the Commission reconsider its April 20, 1988 decision and approve the Unions' notice on the basis that the notice for the period June 30, 1987 - June 30, 1988 is "of necessity based upon the fiscal period, November 1, 1985 through October 31, 1986." The Unions also assert that they are in the process of drafting a notice to cover the June 30, 1988 - June 30, 1989 period based on the appropriate fiscal year 1987. They note that the notice submitted states at page 3 that the calculation will be effective from the effective date of the notice (June 30, 1987) until June 30, 1988, and that a new notice will be received prior to June 30, 1988 containing a new calculation of chargeable versus nonchargeable expenses based on financial information for fiscal year 1987. Thus, they should be permitted to complete and publish the present notice and to proceed to any arbitration pursuant to the notice, and they should be permitted to proceed with preparing their notice for the period June 30, 1988 - June 30, 1989.

COMPLAINANTS

In support of their "Opposition to Motion for Reconsideration," Complainants assert that the Unions' contention that their notice for June 30, 1987 - June 30, 1988 must of necessity be based on the November 1, 1985 - October 31, 1986 fiscal period is erroneous as a matter of fact and as a matter of law.

Complainants contend that there is no reason why the notice cannot be based upon the Respondent Unions' most recently completed fiscal years, i.e., December 31, 1987 for the International and locals, and October 31, 1987 for District Council 48, since they ended more than four to six months ago and the information has been available for some time now. Since the Unions have already collected and used the fees (contrary to the Commission's escrow order), the Unions will not be prejudiced by further delay in recalculating the fee amount and redoing the notice and, if necessary, refunding any over-collections.

As a matter of law, while it has been held that a union's fair share fee may be based upon its expenses for the preceding year, Hudson contemplated that the notice of the basis of the fee would be given before any portion of the fee was collected, i.e., at the beginning of the union's fiscal year. The Complainants concede that under those circumstances, there "are practical reasons why . . . the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year." Citing, Hudson, 475 U.S. at 307, n. 18. "Because

2/ Chicago Teachers Union v. Hudson, 106 S. Ct. 1066 (1986).

First Amendment rights are implicated, the method of calculating service fees for objecting employees adopted by the Union must be narrowly drawn so as to 'minimize both the impingement (upon the objectors' constitutional rights) and the burden (upon the exercise of those rights).'" Citing, Damiano v. Matish, 830 F. 2d 1363, 1369 (6th Cir. 1987). Thus, only "a limited degree of imprecision is tolerable in calculating a service fee." Citing, Lehnert v. Ferris Faculty Association, 643 F. Supp. 1306, 1328 (W.D. Mich. 1986).

The fair share fee may not be based on "budgeted expenditures" where the fiscal year for the fee in question had already ended. Citing, Lehnert, 643 F. Supp. at 1327-28. Budgeted expenditures vary from actual expenditures and a union's spending patterns vary from year to year. While actual data is not available for the full fiscal year of the fee in question, more recent data than that which the Respondent Unions propose to use is readily obtainable. The Commission correctly required the Unions to use the more recent data, as it will reduce the risk of error in the calculation of the fee and increase the likelihood that every non-member will have sufficient information to make "an intelligent and informed" decision as to whether to object. Citing, Damiano, at 1370; Browne, at 42. 3/

DISCUSSION

The Respondent Unions' Motion For Reconsideration does not address two of the defects in their Hudson notice noted in the discussion accompanying our Order of April 20, 1988, i.e., the failure to change the date by which objections or challenges are to be filed and the failure to include the paragraph regarding the right of challengers to an advance rebate. On that basis alone the Unions' Motion must be denied. As to the third problem area, the Unions have requested that the Commission reconsider its decision that the financial information provided in the present notice is defective. We do not find the Unions' arguments persuasive; however, in order to provide additional guidance as to what is required in the notice with regard to the Unions' financial information, we will further address that area.

The Respondent Unions' Hudson notice submitted for the Commission's approval contains financial information for AFSCME International, District Council 48 and its affiliated locals. With respect to AFSCME and a number of the affiliated locals, the financial information is for the accounting period ending December 31, 1986. The financial information provided for District Council 48 is for the accounting period ending October 31, 1986, and in the case of some of the locals the information provided is for accounting periods ending March 31, 1986, April 30, 1986 and May 31, 1986. This information is provided in the Unions' notice as the basis for the fair-share fee to be charged to nonmembers for the period June 30, 1987 - June 30, 1988.

We held in our decision of April 20, 1988 that while Hudson permits the Unions to use their expenses for the prior year to calculate the service fee, the financial information provided in the notice, and upon which the fair-share fee is based, must be from the Unions' most recently completed fiscal years. 4/ Further, to be considered timely, the notice based on the information must be issued within twelve months of the end of the fiscal period from which the financial information is taken. With respect to those locals with fiscal years ending in March, April or May, the information in the Unions' notice, and upon which the fair-share fee for June 30, 1987 - June 30, 1988 is based, is for accounting periods (fiscal years) ending in 1986. Therefore, the information in the notice is not for their most recently completed fiscal years which ended prior to June in 1987, and is not within twelve months of the end of those fiscal periods. Thus, to be sufficient, the notice must include the various accounting periods ending October 31, 1986 through May 31, 1987. The Unions may wish to consider establishing common accounting periods for future years to facilitate compliance with our Orders.

The Complainants contend that the Unions must not only use their expenses for the accounting periods ending in 1987 but also recalculate the fee based on those expenses. While that might be optimum, the Commission recognizes that time

3/ Dec. No. 18408-G (WERC, 4/87).

4/ Dec. Nos. 18408-K, 19545-K at 5.

continues to pass as the parties and the Commission attempt to "work out the bugs" in the Unions' notice and procedures. Given the time that passes during the approval process after the notice has been submitted for approval and that the fee is calculated for a set period, it would be impracticable and unnecessary to require the Unions to both update their information and recalculate the fee as time passes. Under an adequate notice and procedure, any imprecision in the calculation of the fee based on the Unions' expenses for their most recently completed accounting periods should be adequately addressed by the opportunity of "challengers" to submit the calculation of the fee amount to review by an impartial decisionmaker. Therefore, rather than requiring that all of the Unions use their expenses for their accounting periods ending in 1987 to recalculate a fee figure, we will permit the Unions to rely on their expenses for their most recently completed accounting periods that ended prior to June 30, 1987 to compute and provide notice for the fair-share fee to be charged for the period June 30, 1987 to June 30, 1988.

With respect to a notice for the period June 30, 1988 - June 30, 1989, the financial information to be provided must be from the Unions' most recently completed accounting periods that ended prior to June 30, 1988 and must comply with the requirements we have set forth previously in this and prior decisions. Again realizing that time is passing, the fact that such a notice will not be provided sufficiently prior to the start of the new fee period to permit an adequate dissent period before the new fee is implemented (as it is assumed the Unions' procedure anticipates doing and as will hereafter be required) will not be held to affect the adequacy of that notice.

We also note that the notice submitted does not address that time period beginning with the date of the Supreme Court's decision in Hudson (March 4, 1986) to June 30, 1987. The Unions' actual expenses should be available for that period and by our Order of April 24, 1987, in these cases the Respondent Unions must provide adequate notice to all fair-share fee payors they represent and permit them to dissent for the period beginning with the date of the decision in Hudson 5/. It would be permissible for the Unions to provide the information for the two periods separately, but in one notice.

Dated at Madison, Wisconsin this 12th day of July, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

A. Henry Hempe
A. Henry Hempe, Commissioner

5/ Dec. Nos. 18408-G, 19545-G (WERC, 4/87) at 20-21.